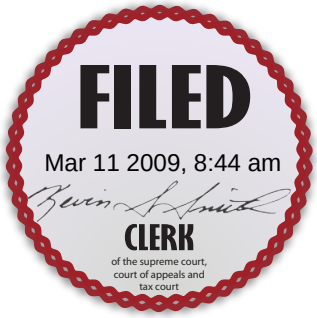

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IN THE
COURT OF APPEALS OF INDIANA

GARY McGUIRE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0808-CR-675
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0605-FA-80424

March 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, Gary McGuire appeals his convictions and sentence for dealing in cocaine, a Class A felony; possession of cocaine and a firearm, a Class C felony; possession of a sawed-off shotgun, a Class D felony; and resisting arrest, a Class A misdemeanor. On appeal, McGuire raises four issues, which we consolidate and restate as 1) whether the trial court properly admitted into evidence items seized pursuant to a warrant that authorized the search of McGuire's home; 2) whether sufficient evidence supports McGuire's conviction for dealing in cocaine; and 3) whether McGuire's sentence is inappropriate in light of the nature of the offenses and his character. Concluding the trial court properly admitted the items into evidence, sufficient evidence supports McGuire's conviction for dealing in cocaine, and McGuire's sentence is not inappropriate, we affirm.

Facts and Procedural History

On May 4, 2006, officers with the Indianapolis Police Department's Narcotics Unit executed a search warrant at McGuire's home located at 1659 South Delaware Street.[1] No one was there when the officers entered, and their searches resulted in the seizure of, among other things, two baggies containing a total of 30.99 grams of cocaine, eighteen Alprazolam pills,[2] a sawed-off shotgun, and a digital scale containing cocaine residue. While the officers were searching the home, a woman and three men

[1] Whether McGuire resided at 1659 South Delaware Street was a significant issue at trial because it provided supporting evidence for the possession charges. In finding McGuire guilty of some of those charges, the trial court necessarily decided that issue against McGuire, and he does not challenge the trial court's decision on appeal.

[2] Alprazolam, more commonly known as Xanax, is a controlled substance. See Ind. Code § 35-48-2-10(c); Burkes v. State, 842 N.E.2d 426, 429 (Ind. Ct. App. 2006), trans. denied.

approached. One of the men was later identified as McGuire; he and the other two men fled after the officers announced their presence and ordered the men to the ground. Following a brief chase, all three were apprehended and placed under arrest.

On May 8, 2006, the State charged McGuire with dealing in cocaine, a Class A felony; possession of cocaine, a Class C felony; possession of cocaine and a firearm, a Class C felony; possession of a controlled substance, a Class D felony; possession of a sawed-off shotgun, a Class D felony; and resisting law enforcement, a Class A misdemeanor. McGuire pled guilty to the possession of cocaine charge, and the trial court presided over a bench trial on the remaining charges, finding McGuire guilty on all counts except possession of a controlled substance. The trial court then entered judgments of conviction on all charges except possession of cocaine (presumably because it was a lesser-included offense of dealing in cocaine) and sentenced McGuire to forty years for dealing in cocaine, eight years for possession of cocaine and a firearm, three years for possession of a sawed-off shotgun, and one year for resisting law enforcement. The trial court ordered McGuire to serve these sentences concurrent to one another, but consecutive to a pending, unrelated sentence in Hamilton County for dealing in cocaine.[3] McGuire now appeals.

Discussion and Decision

I. Admission of Evidence

McGuire argues the trial court improperly admitted evidence seized from the search of his home. McGuire bases his argument on two deficiencies in the warrant,

[3] This court recently affirmed McGuire's conviction in the Hamilton County proceeding. McGuire v. State, No. 29A05-0811-CR-00678, 2009 WL 455391 (Ind. Ct. App., Feb. 24, 2009).

contending it was not supported by probable cause and did not particularly describe the place to be searched, both of which are required by the Fourth Amendment of the United States Constitution.[4] Before addressing these contentions, we note that although McGuire filed a motion to suppress evidence seized from the search of his home, he failed to object at trial when that same evidence was admitted. McGuire's failure to object therefore results in waiver because "a trial court's denial of a motion to suppress does not preserve error." Poulton v. State, 666 N.E.2d 390, 393 (Ind. 1996). Instead, "[t]he proper method of preserving error for appellate review is an objection to the admission of the allegedly illegally obtained evidence at the time it is offered into evidence during trial." Id. Waiver notwithstanding, we will address McGuire's contentions on their merits but first note our standard of review:

> Our standard of review for rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. We also consider uncontroverted evidence in the defendant's favor.

Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007) (citations omitted).

McGuire's contention that the warrant was not supported by probable cause is procedural in nature; that is, he claims that because the State failed to introduce the supporting affidavit into evidence at trial, the trial court did not have a "substantial basis" to conclude probable cause existed. McGuire is correct that a trial or appellate court may

[4] In his brief, McGuire also cites state analogues to the Fourth Amendment, specifically Article I, Section 11, of the Indiana Constitution and statutory provisions relating to warrants and probable cause affidavits, but does not appear to argue that the trial court's admission of evidence seized from the search of his house violated these provisions. As such, we will limit our analysis to McGuire's Fourth Amendment argument only. Cf. Henderson v. State, 769 N.E.2d 172, 175 n.6 (Ind. 2002) (concluding defendant's argument that a warrantless arrest violated Article I, Section 11, of the Indiana Constitution was waived because "the defendant presents no authority or independent analysis supporting a separate standard under the state constitution").

sustain a magistrate's decision to issue a warrant only if there was a substantial basis for the magistrate to conclude probable cause existed. Illinois v. Gates, 462 U.S. 213, 238 (1983). McGuire's contention, however, that the State's failure to introduce the supporting affidavit precluded the trial court from reaching a substantial basis conclusion misunderstands the allocation of the burden of proof. In cases such as this one where the search was conducted pursuant to a warrant, the burden is on the defendant to demonstrate the search was unreasonable. State v. Tungate, 899 N.E.2d 60, 65 (Ind. Ct. App. 2008). The defendant can carry such a burden in several ways, for example by demonstrating that the search exceeded the scope of the warrant, see, e.g., Tongut v. State, 197 Ind. 539, 546-47, 151 N.E. 427, 430 (1926), or, as argued here, by establishing that the warrant was not supported by probable cause. But in all such cases, it goes without saying that allocation of the burden of proof to the defendant implies that he must marshal evidence to sustain the burden. McGuire has not done so here, and we do not think he can overcome this shortcoming by pointing to the State's failure to introduce evidence.

McGuire's second contention, that the warrant was defective because it did not particularly describe the place to be searched, is based on the warrant's failure to state the house's full address. Specifically, the warrant describes the home as a "one (1) story wood framed, white sided with white trim, double family dwelling. The numerals 1659 are affixed to the front of the residence. Furthermore, the residence to be searched is the south half of the double." State's Exhibit 1. McGuire claims that because this

description does not include the street name, it "could describe dozens, perhaps hundreds of residences." Appellant's Brief at 7.

Implicit in this claim is that determining whether a warrant particularly describes the place to be searched entails a review of the face of the warrant only, but, as the State points out, such an implication overlooks this court's recognition in Dost v. State, 812 N.E.2d 232, 236 (Ind. Ct. App. 2004), trans. denied, that the particularity requirement may be satisfied if the affidavit accompanying the warrant contains the correct address. As noted above, the affidavit was not admitted into evidence at trial, but it was admitted during the suppression hearing, and the record from that hearing indicates the affidavit stated the house was located at "1659 South Delaware." Transcript at 7 (September 1, 2006, Suppression Hearing). Thus, consistent with Dost, we conclude the warrant's failure to include the full street address is not fatal to the particularity requirement because the affidavit overcomes any alleged deficiency.

Having rejected McGuire's arguments that the warrant was not supported by probable cause and that the warrant does not meet the particularity requirement, we are left with a valid warrant authorizing a search of McGuire's home. Under such circumstances, we cannot say the trial court abused its discretion when it admitted into evidence items seized pursuant to that warrant.

II. Sufficiency of Evidence

McGuire argues that insufficient evidence supports his dealing in cocaine conviction. In addressing challenges to the sufficiency of the evidence, we neither reweigh evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126

(Ind. 2005). Instead, we "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" Id. (quoting Alkhalidi v. State, 753 N.E.2d 625, 627 (Ind. 2001)).

To convict McGuire of dealing in cocaine as a Class A felony, the State had to prove beyond a reasonable doubt that McGuire knowingly possessed more than three grams of cocaine with intent to deliver it. See Ind. Code § 35-48-4-1(a)(2)(C) and (b)(1); Woodford v. State, 752 N.E.2d 1278, 1282 (Ind. 2001), cert. denied, 535 U.S. 999 (2002). McGuire's sole challenge to the sufficiency of the evidence concerns whether the substance seized from his home was cocaine; he claims the State's proof was insufficient because it did not introduce evidence that the substance was subjected to laboratory analysis and, although he pled guilty to Class C felony possession of cocaine, the factual basis from the plea hearing does not indicate whether he admitted that the substance recovered from the baggies or the residue recovered from the digital scale was cocaine. Both of these claims are beside the point, however, because at the outset of McGuire's bench trial, the parties stipulated to the following:

> [O]n May 4, 2006, Police Officers from the Indianapolis Police Department, now IMPD, served a search warrant on the residence located at 1659 South Delaware. That during the execution of the search warrant police officers discovered and seized from inside the residence cocaine, a scale, 18 Alprazolam tablets, one Mossberg shotgun. Fingerprints were requested for the scale and the shotgun. However, there were no fingerprints. Cocaine seized by the police officers during the execution of the search warrant was tested and it turned out to be 30.9918 grams.

Transcript at 13 (June 3, 2008, Bench Trial). "A party entering into a stipulation with the consent of the other party is bound to the facts so stipulated." Lyons v. State, 431 N.E.2d

78, 80 (Ind. 1982). This rule extends to stipulations pertaining to an element of a criminal offense. See Kellett v. State, 716 N.E.2d 975, 979 (Ind. Ct. App. 1999). With the parties having stipulated that 30.99 grams of cocaine were seized during the search of McGuire's home, we fail to see how evidence on this point was lacking. Thus, it follows that sufficient evidence supports McGuire's dealing in cocaine conviction.

III. Appropriateness of Sentence

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. In conducting this review, however, the burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Because the trial court ordered that McGuire serve his sentences concurrently, he received an aggregate sentence of forty years, which is between the advisory and maximum term for a Class A felony. See Ind. Code § 35-50-2-4. Turning first to the

nature of the offenses, McGuire argues they were less egregious than is typical because he did not resort to violence and was not in possession of a firearm when arrested. We find this argument illusory – a defendant can always claim that his offenses merit leniency by pointing to more severe conduct he abstained from – and choose instead to focus on the nature of the offenses that were actually committed. In that respect, McGuire possessed more than ten times the amount of cocaine necessary to elevate his dealing in cocaine offense to a Class A felony. See Ind. Code § 35-48-4-1(b)(1). That makes the dealing in cocaine offense more egregious than is typical. Cf. Ind. Code § 35-38-1-7.1(a)(1) (permitting a trial court to find as an aggravating circumstance that the harm, injury, loss, or damage suffered by the victim was greater than the elements necessary to prove the commission of the offense).

Regarding McGuire's character, we applaud his recent completion of parenting and substance abuse classes, and express our hope that he continues to take advantage of rehabilitative programs while incarcerated. That said, we cannot overlook that McGuire has a substantial criminal history, especially when it comes to drug-related offenses: convictions in 1998 and 2005 for Class D felony possession of marijuana, a conviction in 2001 for Class C felony possession of cocaine, and a conviction in 2008 for Class A felony dealing in cocaine.[5] Our supreme court has stated that the significance of a defendant's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). Four separate drug-related offenses in the span of ten years, coupled with

[5] This dealing in cocaine offense is the Hamilton County proceeding. See supra, note 3. According to the presentence investigation report, McGuire committed that offense in January 2005, see Presentence Investigation Report at 7, well before his commission of the instant offenses.

the fact that McGuire was incarcerated for over three years during that span for his possession of cocaine conviction, is a substantial criminal history that in turn reflects very negatively on McGuire's character. Considering McGuire's criminal history in conjunction with the nature of the offenses, we are not convinced he has demonstrated his sentence is inappropriate.

Conclusion

The trial court did not abuse its discretion when it admitted into evidence items seized during a search of McGuire's home, sufficient evidence supports McGuire's dealing in cocaine conviction, and McGuire's sentence is not inappropriate in light of the nature of the offenses and his character.

Affirmed.

CRONE, J., and BROWN, J., concur.